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No. 91-941

In The

Supreme Court of the United States

October Term, 1991

JOHN V. ESPOSITO, et al.,

Petitioners,

vs.

SOUTH CAROLINA COASTAL COUNCIL, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The United States

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Has Petitioners' challenge to the S. C. Beachfront Management Act ripened into a controversy worthy of adjudication, when Petitioners have failed to exhaust available administrative remedies?

2. Does a compensable taking of property occur under the Fifth Amendment to the United States Constitution when a State prohibits construction in order to advance a legitimate state interest.

3. Does a compensable taking of property occur under the Fifth Amendment to the United States Constitution based solely upon a claim by an owner of improved property that a land use regulation inhibits, prevents, or alters future construction plans to existing structures?

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STATEMENT OF THE CASE

John V. Esposito and others are property owners in the Town of Hilton Head, Beaufort County, South Carolina. These property owners have improved their property with residential dwellings. Respondent South Carolina Coastal Council is a state agency, charged with the management of coastal resources within the eight coastal counties of South Carolina. Respondent, among other things, has responsibility for implementation of the 1988 Beachfront Management Act, Act 634, which amended the 1977 Coastal Zone Management Act.

Pursuant to the Act, S.C. Code of Laws Ann. Section 48-39-280 (Supp. 1988), a setback scheme was established to control construction near the ocean. This scheme included a baseline located at the most landward shoreline in the past 40 years, a setback line located by multiplying 40 times the annual erosion rate, and a 20 foot no construction line located 20 feet behind the baseline.

The property owned by the *Esposito* Petitioners have improvements existing at least partially seaward of the baseline or within that area extending twenty feet landward of the baseline. Pursuant to the Act as it was written at the time these actions commenced, it these dwellings were destroyed by fire or natural causes, they could not be rebuilt seaward of the baseline or within twenty feet landward of the baseline. The Act also regulated any attempts to make additions to these structures. Since commencement of these actions, but prior to any decision by the Fourth Circuit Court of Appeals, the Act was amended to allow for issuance of special permits, as discussed below [Appendix A].

The *Esposito* Petitioners filed an action in the United States District Court for the District of South Carolina alleging that the 1988 amendments to the Act violate the due process and just compensation provisions of the Fifth Amendment. The District Court found that the Petitioners failed to demonstrate an economic injury sufficient to invoke the protection of the takings clause. The Petitioners had existing structures on their lots, and had not suffered any damages or loss to these structures. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's holding.

Barney L. Chavous and Odessa K. Chavous purchased an unimproved lot on Hilton Head Island prior to the enactment of the 1988 Amendment to the Act. The implementation of the amendment precluded the Chavouses from any construction on their lot. The Chavouses filed an action in District Court identical in nature to that of the *Esposito* property owners.

The District Court found that the Chavouses had demonstrated an economic injury sufficient to invoke the protection of the takings clause. The Court issued an injunction against South Carolina Coastal Council, enjoining any enforcement of construction prohibition as to the Chavous property.

For purposes of appeal to the Fourth Circuit, *Chavous* was joined with *Esposito*. The S.C. Beachfront Management Act was amended during the pendency of the appeal. [Appendix A] These 1990 amendments implemented less restrictive regulations governing construction in that area twenty feet landward of the baseline. Furthermore, the amendments allowed the issuance of

special permits for construction or reconstruction of habitable structures under certain conditions, even in areas seaward of the baseline. S.C. Code Ann. Sec. 48-39-290(D) (Supp. 1990) The Chavouses have applied for and obtained a special permit for construction of a dwelling on their lot. [See Appendix B] On this basis, the Fourth Circuit Court of Appeals vacated the judgment in *Chavous* as moot.

REASONS FOR DENYING THE PETITION FOR WRIT

I. The Petitioners have failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10.

The Petitioners have failed to demonstrate in their petition, that any special or important reason for granting Certiorari exists, as required by Rule 10. Rule 10 States that a "Petition for Writ of Certiorari will be granted only when there are special or important reasons therefore." Contrary to the way that the Petitioners characterize the case, this decision is not in conflict with any decision of the United States Supreme Court, decisions of other state courts of last resort or decisions of the United States Court of Appeals.

II. The Petitioners have failed to exhaust the administrative remedies pursuant to S.C. Code Sec. 48-39-290(D), 1976 (Supp 1990), allowing for application and issuance of permits to build structures other than erosion control structures or devices seaward of the baseline.

This Court has consistently held that a land-use challenge is not ripe where the property owner has not

applied for a variance nor filed for a determination of whether a permit would be issued by the regulating agency. *Agins v. City of Tiburon*, 447 U.S. 225 (1980); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986).

Based on this line of cases, Petitioners' challenge to the Act is not ripe in that, with regard to the *Esposito* property owners, they have not asserted a need for additions or improvements to the structures located on their beachfront lots. Once this need arises, these petitioners have an opportunity to obtain a permit. This Court should not consider this case until such time as these Petitioners have availed themselves of the opportunities provided by the 1990 amendments.

III. The United States Court of Appeals for the Fourth Circuit properly concluded that there exists an essential nexus between regulation of a legitimate State interest, and the strategy adopted by the S.C. legislature in the S.C. Beachfront Management Act to achieve this Regulation.

Petitioners argue that the Act is irrational as there is no connection between its means (prohibiting construction) and its end (protection of the S.C. coast). [Pet. 12] According to the Petitioner, there is no evidence in the record to show that the construction of houses on the beachfront alters or exacerbates the process of beach erosion.

The stated purpose of the S.C. Beachfront Management Act is to create a comprehensive, long-range beach

management plan for the state by severely restricting the use of hard erosion control devices along the coast and by establishing a policy of retreat from the front beach. S.C. Code of Laws Sec. 48-39-280 (1976). Responding to the serious problem of residential development having been historically located too close to the beach/dune system, the Legislature implemented a forty-year retreat policy by establishing certain lines including a baseline and a setback line, and regulating the construction of new habitable structures and the rebuilding of structures located seaward of these lines. S.C. Code of Laws, Sec. 48-39-280 (1976).

A basic proposition underlying the Legislature's purpose in enacting the Beachfront Management Act is the belief that hard erosion control devises must be severely restricted in order to deal with shoreline erosion problems. The Act reflects the Legislature's decision to regulate construction along the beach/dune system rather than try to armor the beach.

This Court has indicated that " . . . a broad range of governmental purposes . . . " will be recognized as legitimate state interests, as well as " . . . a broad range of regulations . . . ," as substantially advancing these interests. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987). In *Berman et al., Executors v. Parker et al.*, 348 U.S. 26 (1954), this Court reviewed legislation implemented to provide a plan for redevelopment of the District of Columbia, and articulated its philosophy regarding legislative and judicial functions in the State's exercise of their police power.

Accordingly, this Court held as follows:

> An attempt to define [police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs . . . once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.

Berman v. Parker at 32-33

This philosophy was reiterated in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1980). There, coal producers challenged an Act of Congress regulating surface mining. Part of the basis for their challenge was that the means selected by Congress and provided for in the Act were redundant and unnecessary. In addressing this challenge, this Court determined that " . . . the effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment." *Hodel* at 283. Clearly, it would be impossible to argue that the S.C. legislature's intended purpose in the implementation of the Beachfront Management Act, that is, protection of the beach/dune system along the coast of South Carolina, is not a legitimate State interest under *Nollan*. Applying

the philosophy articulated by this Court when considering whether legislative strategies or plans are Constitutional, their is no basis for Petitioners' argument that the S.C. legislature acted irrationally. The record before the District Court was replete with testimony and evidence in support of the methods selected by the State of S.C. to achieve the stated purpose of the Act. The Fourth Circuit Court of Appeals reviewed the record and correctly deferred to the judgment of the State legislature, finding that " . . . the decision to adopt a strategy of gradually withdrawing unwise development from the beach/dune system was a logical and sufficiently well-founded approach to dealing with beachfront erosion by attempting to restore the natural equilibrium between sand supply, wind, and waves." *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (1991).

IV. The United States Court of Appeals for the Fourth Circuit properly concluded that application of the S.C. Beachfront Management Act to the *Esposito* petitioners did not amount to a taking.

The Fourth Circuit Court of Appeals determined that the injury claimed by Petitioners as a result of application of the Act was that of diminution of property value. This Court has held that a "diminution of property value, standing alone . . . " does not establish a taking. *Penn. Central Transp Co. v. New York City*, 438 U.S. 104 at 131 (1979).

Petitioners claim that they have suffered more than mere diminution of value, rather, they have been denied all economically viable use of their property and their

legitimate investment-backed expectations have been defeated. [Pet. 40] Petitioners rely on *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) as authority for finding a regulatory taking as a result of application of the Act to these Petitioners.

The Court of Appeals was correct in concluding that the injury suffered by Petitioner, if any, was diminution in value. The record supports this conclusion, and Petitioners' claim of loss of all economically viable use of the property is simply untenable. These Petitioners have valuable, existing structures erected on their property. These structures are homes, providing shelter and comfort to the Petitioners. There is nothing to support the assertion that these homes, and the property on which they are located, have no economic value. The only evidence is as to a loss of value.

In *Agins v. Tiburon*, relied upon by Petitioners, this Court upheld zoning ordinances in Tiburon, California that provided for protection of open-space land. The developer challenging these ordinances argued that the City of Tiburon had "completely destroyed the value of [the developer's] property for any purpose or use whatsoever . . . " *Agins* at 258. In reality, the ordinance permitted development of as many as five single family dwellings on the developer's property. While this may have conflicted with the developer's plans for the property, it certainly didn't "prevent the best use of appellant's land, . . . nor extinguish a fundamental attribute of ownership . . . " *Agins* at 267. Therefore, the developers' claim of a complete loss of value was unfounded.

The *Esposito* Petitioners have no basis for claiming a complete loss of value. They have the best use of their property, that is, they are residing on it. As to their claim that they have lost the alienability of their property [Pet. 21], this claim is nothing more than an assumption.

The zoning ordinances in question in *Agins v. Tiburon* provide that a developer submit a plan for approval. the developers had never submitted such a plan. This Court found no loss of reasonable investment expectations, in that the appellants were still " . . . free to pursue their reasonable investment expectations by submitting a development plan to local officials." *Agins* at 262.

This reasoning is applicable to the *Esposito* property-owners. Their claim of loss of their reasonable investment expectations, and their loss of all economic use, are premature in light of the 1990 amendments and their right to apply for a special permit. [See Appendix A]

Petitioners appear to rely upon this Court's ruling in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1986), in support of their claim of a taking. In *Keystone*, coal companies doing business in Pennsylvania challenged certain legislation know as the Subsidence Act, regulating coal mining in an effort to minimize subsidence, or the lowering of the land surfaces overlying a coal mine. Rather than supporting Petitioners' claims, *Keystone* confirms the principles enunciated by this Court in *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sabastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Town of Hempstead*, 359 U.S. 590 (1962). These cases developed this Court's position that there can never be a compensable taking of private

property when the State is validly exercising its police power.

> [M]any cases . . . have recognized the nature of the State's actions is critical in takings analysis . . . The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal*. One of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it . . . [A]s the cases demonstrate, the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation. *Keystone* at 488-489, 491, 492.

At most, Petitioners have suffered diminished value of their properties. There is nothing, either in the facts as presented to the District Court or the applicable law to support Petitioner's claim of a loss of all economic use. Additionally, the Beachfront Management Act is a valid exercise of the State of South Carolina's police powers, and not subject to a takings challenge.

V. The United States Court of Appeals for the Fourth Circuit properly concluded that *Chavous* was moot.

The Court of Appeals concluded that the *Chavous* claim for relief was moot since "[t]he injunctive remedy granted by the district court has become pointless because the enjoined statute has been superceded by a significantly amended statutory scheme and is no longer in effect." *Esposito v. S. C. Coastal Council*, 939 F.2d 165 (1991). [Appendix A]

On December 17, 1990 Barney Chavous, applicant, was issued a permit allowing construction of a habitable structure and swimming pool. [Appendix B] "The United States Supreme Court has stated that it does not sit to decide constitutional arguments after events have put them to rest." 16 Am Jur 2d 16, *Constitutional Law*. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court noted that:

> Justiciability is itself a concept of uncertain meaning and scopes. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties are asking for an advisory opinion, *when the question sought to be adjudicated has been mooted by subsequent developments*, and when there is no standing to maintain the action . . .

Flast at 95 (emphasis added)

Petitioners fail to note in their Petition the fact that the Chavouses were issued a permit, one year ago. Petitioners argued that " . . . [f]rom the 'bundle of sticks' that is supposed to constitute our right to own property . . . [t]he Chavouses have no sticks at all." [Pet. 25]

The question of whether the Chavouses have suffered a taking was rendered moot by these subsequent developments – the passage of the 1990 amendments and the issuance of a permit. The Court of Appeals properly remanded *Chavous* to the district court to be dismissed as moot.

CONCLUSIONS

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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APPENDIX A

§ 48-39-290. Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

(A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;

(2) small wooden decks no larger than one hundred forty-four square feet;

(3) fishing piers which are open to the public. Those fishing piers with their associated structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated structures which existed on September 21, 1989, that were privately owned, privately maintained, and not open to the public on this date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) golf courses;

(5) normal landscaping;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device.

A permit must be obtained from the council for items (2) through (7).

(B) Construction, reconstruction, or alterations between the baseline and the setback line are governed as follows:

(1) Habitable structures:

(a) New habitable structures: If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the council that the construction meets the following requirements:

(i) The habitable structure is no larger than five thousand square feet of heated space. The structure must be located as far landward on the property as practicable. A drawing must be submitted to the council showing a footprint of the structure on the property, a cross section of the structure, and the structure's relation to property lines and setback lines which may be in effect. No erosion control structure or device may be incorporated as an integral part of a habitable structure constructed pursuant to this section.

(ii) No part of the building is being constructed on the primary

oceanfront sand dune or seaward of the baseline.

(b) Habitable structures which existed on the effective date of Act 634 of 1988 or constructed pursuant to this section:

(i) Normal maintenance and repair of habitable structures is allowed without notice to the council.

(ii) Additions to habitable structures are allowed if the additions together with the existing structure do not exceed five thousand square feet of heated space. Additions to habitable structures must comply with the conditions of new habitable structures as set forth in subitem (a).

(iii) Repair or renovation of habitable structures damaged, but not destroyed beyond repair, due to natural or manmade causes is allowed.

(iv) Replacement of habitable structures destroyed beyond repair due to natural causes is allowed after notification is provided by the owner to the council that all of the following requirements are met:

a. The total square footage of the replaced structure seaward of the setback line does not exceed the total square footage of the original structure seaward of the setback

line. The linear footage of the replaced structure parallel to the coast does not exceed the original linear footage parallel to the coast.

b. The replaced structure is no farther seaward than the original structure.

c. Where possible, the replaced structure is moved landward of the setback line or, if not possible, then as far landward as is practicable, considering local zoning and parking regulations.

d. The reconstruction is not seaward of the baseline unless permitted elsewhere in Sections 48-39-250 through 48-39-360.

(v) Replacement of habitable structures destroyed beyond repair due to manmade causes is allowed provided the rebuilt structure is no larger than the original structure it replaces and is constructed as far landward as possible, but the new structure must not be farther seaward than the original structure.

(2) Erosion control devices:

(a) No new erosion control structures or devices are allowed seaward of the setback line except to protect a public

highway which existed on the effective date of this act.

(b) Erosion control structures or devices which existed on the effective date of this act must not be repaired or replaced if destroyed:

(i) more than eighty percent above grade through June 30, 1995;

(ii) more than sixty-six and two-thirds percent above grade from July 1, 1995, through June 30, 2005;

(iii) more than fifty percent above grade after June 30, 2005.

(iv) Damage to seawalls and bulkheads must be judged on the percent of the structure remaining intact at the time of damage assessment. The portion of the structure or device above grade parallel to the shoreline must be evaluated. The length of the structure or device parallel to the shoreline still intact must be compared to the length of the structure or device parallel to the shoreline which has been destroyed. The length of the structure or device parallel to the shoreline determined to be destroyed divided by the total length of the original structure or device parallel to the shoreline yields the percent destroyed. Those portions of the structure or

device standing, cracked or broken piles, whalers, and panels must be assessed on an individual basis to ascertain if these components are repairable or if replacement is required. Revetments must be judged on the extent of displacement of stone, effort required to return these stones to the prestorm event configuration of the structure or device, and ability of the revetment to retain backfill material at the time of damage assessment. If the property owner disagrees with the assessment of a registered professional engineer acting on behalf of the council, he may obtain an assessment by a registered professional engineer to evaluate, as set forth in this item, the damage to the structure or device. If the two assessments differ, then the two engineers who performed the assessments must select a registered professional engineer to perform the third assessment. If the first two engineers are unable to select an engineer to perform the third assessment, the clerk of court of the county where the structure or device lies must make the selection of a registered professional engineer. The determination of percentage of damage by the third engineer is conclusive.

(v) The determination of the degree of destruction must be made on a lot by lot basis by reference to county tax maps.

(vi) Erosion control structures or devices must not be enlarged, strengthened, or rebuilt but may be maintained in their present condition if not destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii). Repairs must be made with materials similar to those of the structure or device being repaired.

(c) Erosion control structures or devices determined to be destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii) must be removed at the owner's expense. Nothing in this section requires the removal of an erosion control structure or a device protecting a public highway which existed on the effective date of Act 634 of 1988.

(d) The provisions of this section do not affect or modify the provisions of Section 48-39-120(C).

(3) Pools, as defined in Section 48-39-270(12):

(a) No new pools may be constructed seaward of the setback line unless the pool is built landward of an erosion control structure or device which was

in existence or permitted on the effective date of this act and is built as far landward as practical.

(b) Normal maintenance and repair is allowed without notice to the council.

(c) If a pool, existing on July 1, 1988, is destroyed beyond repair, as determined by the council pursuant to Section 48-39-270(11), it may be replaced if the owner certifies in writing to the council that:

(i) It is moved as far landward as practical. This determination of practicality must include the consideration of local zoning requirements.

(ii) It is rebuilt no larger than the destroyed pool.

(iii) It is constructed according to acceptable standards of pool construction and cannot be reinforced in a manner so as to act as an erosion control structure or device.

(d) If a pool is not destroyed beyond repair as determined by the council pursuant to Section 48-39-270(11) but the owner wishes to replace it, the owner may do so if:

(i) The dimensions of the pool are not enlarged.

(ii) The construction conforms to subsubitem (iii) of subitem (c).

(4) All other construction or alteration between the baseline and the setback line requires a council permit. However, the council, in its discretion, may issue general permits for construction or alterations where issuance of the general permits would advance the implementation and accomplishment of the goals and purposes of Sections 48-39-250 through 48-39-360.

(C) (1) Notwithstanding the provisions relating to new construction, a person, partnership, or corporation owning real property that is affected by the setback line as established in Section 48-39-280 may proceed with construction pursuant to a valid building permit issued as of the effective date of this section. The person, partnership, or corporation may proceed with the construction of buildings and other elements of a master plan, planned development, or planned unit development notwithstanding the setback line established in this chapter if the person, partnership, or corporation legally has begun a use as evidenced by at least one of the following:

(a) All building permits have been applied for or issued by a local government before July 1, 1988.

(b) There is a master plan, planned development, or planned unit development:

(i) that has been approved in writing by a local government before July 1, 1988; or

(ii) where work has begun pursuant to approval as evidenced by the

completion of the utility and infrastructure installation designed to service the real property that is subject to the setback line and included in the approved master plan, planned development, or planned unit development.

(2) However, repairs performed on a habitable structure built pursuant to this section are subject to the guidelines for repairs as set forth in this section.

(3) Nothing in this section prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline, if permitted by the council.

(D) Special permits:

(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the council may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the council orders the removal. However, the use of the property authorized under this provision, in the determination of the council, must not be

detrimental to the public health, safety, or welfare.

(2) The council's Permitting Committee is the committee to consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48-39-250 through 48-39-360.

(4) A party aggrieved by the committee's decision to grant or deny a special permit application may appeal to the full council pursuant to Section 48-39-150(D).

(E) The provisions of this section and Section 48-39-280 do not apply to an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section III Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986, and approved by the United States Army Corps of Engineers. Nothing contained in this subsection makes this area ineligible for beach renourishment funds.

The baseline determined by the local governing body and the council is the line of erosion control devices and structures and the council retains its jurisdiction seaward of the baseline. In addition, upon completion of a council approved beach renourishment project, including the completion of a sand transfer system if necessary for long-term stabilization, an area under a Section III Study becomes subject to all the provisions of this chapter.

For the purposes of this section, a beach nourishment project stabilizing the beach exists if a successful restoration pro ct is completed consisting of at least one hundred fifty cubic yards a foot over a length of five and one-half miles, with a project design capable of withstanding a one-in-ten-year storm, as determined by council, and renourishment is conducted annually at a rate, agreed upon by the council and local governing body, equivalent to that which would occur naturally if the navigation project causing the erosion did not exist. If the two parties cannot agree, then the council must obtain the opinion of an independent third party.

Any habitable structure located in an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section III Study, which was in existence on September 21, 1989, and was over forty years old on that date and is designated by the local governing body as an historical landmark may be rebuilt seaward of the baseline if it is rebuilt to the exact specifications, dimensions, and exterior appearance of the structure as it existed on that date.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their

resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this

act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

APPENDIX B

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN (ATTACHMENT 1) AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS, AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AT THE COASTAL COUNCIL MAY CONSIDER APPROPRIATE.

CAUTION: Section 15(D) of Act 123 of 1977 allows any person adversely affected by the issuance of a Coastal Council permit to appeal the decision to the full Council by filing a written Notice of Intent to Appeal within 15 days after notification of the permit's issuance. In the event of an appeal of the decision to issue this permit, the coastal Council reserves the right to order a stay of any use or activity authorized herein pending a final decision by the full Council when, in its judgment, the interests of the public would be best served.

Accepted this 13 day of March, 1991

/s/ Barney L. Chavous
Permittee

Issued this 17th day of December, 1990.
State of South Carolina
Coastal Council
John C. Hayes, III,
Chairman

By: /s/ Steve Moore
Steve Moore
Permit
Administrator

ATTACHMENT 1:

The plans submitted by you, attached hereto, show the proposed work consists of constructing a habitable structure, and a swimming pool with associated decking seaward of the baseline. The application is made pursuant to Section 48-39-290(D) of the 1990 Beachfront Management Act allowing applications to be submitted for activities seaward of the baseline. This application also includes driveways and attached decking. The pool will be 10' by 20' and will be surrounded by concrete decking. The purpose of the activity is to construct a single family residence. *These plans are approved as submitted: subject to the following special conditions.*

SPECIAL CONDITIONS:

1. Provided the permittee must submit final plans for the habitable structure to the Council for approval before any work takes place on this site. These plans must show the following:

   a. That the habitable structure is no larger than 2,500 square feet of heated space.

   b. That the structure is located as far landward as practicable with this determination being made by Council.

   c. The footprint of the structure on the property, a cross-section of the structure and the structure's relation to property lines and any setback lines which may be in effect.

   d. That no erosion control structure or device is incorporated as part of the structure.

e. That no part of the structure is located on the primary ocean-front sand dune.

2. Provided that if the beach erodes to the extent the structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the Council orders the removal.

3. Provided that by acceptance of this permit the Permittee acknowledges that the Council in no way assumes the suitability of this lot for construction and agrees to hold the Council harmless from any and all claims, or causes of action which may result from issuance of this permit. Any construction is done at the risk of the permittee.

4. Provided that all applicable federal, state and local laws and regulations are complied with.

5. Issuance of this permit is granted pursuant to Order of United States District Judge Falcon B. Hawkins, dated March 27, 1990 which enjoins the Council from enforcing any construction prohibitions of the Coastal Management Act and which Order is now under appeal. Issuance of this permit does not guarantee the issuance of a permit in the event the structure on this lot is destroyed.

6. Provided that the pool and its associated decking is not allowed.

THE PERMITTEE HAS READ THE SPECIAL CONDITIONS AND AGREES TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THESE SPECIAL CONDITIONS.

/s/ Barney L. Chavous
Permittee